No. 78-512

In the Supreme Court of the United States

OCTOBER TERM, 1978

KONIAG, INC., ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-69a) is reported at 580 F. 2d 601. The opinion of the district court (Pet. App. 70a-91a) is reported at 405 F. Supp. 1360.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1978. By order of July 10, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 25, 1978, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly recognized the administrative standing of the State of Alaska, the Fish

and Wildlife Service, and the Forest Service to protest the initial decision of the Bureau of Indian Affairs within the Department of the Interior on the eligibility of certain villages to receive benefits under the Alaska Native Claims Settlement Act.

2. Whether, after concluding that Interior's procedures had denied due process, the court of appeals, under the circumstances, properly directed a remand to the Secretary instead of reinstating the decision of a subordinate departmental official who had arrived at his decision without any adversary hearing.

3. Whether the court of appeals and the district court correctly decided that the roll prepared by the Secretary under Section 5 of the Alaska Native Claims Settlement Act was not conclusive on the Secretary when later, under Section 11 of the Act, he made his findings of fact concerning Native residence for village eligibility.

STATEMENT

1. By the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. (Supp. V) 1601 *et seq.*, Congress adopted a comprehensive legislative scheme to settle the century-old aboriginal land claims of the Alaska Natives. Briefly, the Act extinguished the Natives' claims to about 250 million acres in Alaska and substituted a right to share in a $962.5-million Native Claims fund and to select 40 million acres, to be distributed through eligible Native villages and regional corporations. Of course, only Natives are meant to share in these benefits.

The Act divided Alaska into twelve resident regions in which the Natives organized "Regional Corporations" (plus a thirteenth regional corporation for non-resident Natives). Section 7, 43 U.S.C. (Supp. V) 1606. Depending upon their population, eligible villages were entitled to select the surface estate to between 69,120 and 161,280 acres from the public lands in their vicinity (the regional

corporation would receive a patent to the mineral estate). Sections 12(a) and 14, 43 U.S.C. (Supp. V) 1611(a) and 1613. After all eligible village corporations had made the first-round selections, the regional corporations had the second-round land selection. In the second round, the difference between 22 million acres and the total acreage selected by village corporations in the Section 12(a) first-round selection would be allocated among 11 of the 12 resident corporations on the basis of population;[1] these would then reallocate their share among eligible villages in their region. Section 12(b), 43 U.S.C. (Supp. V) 1611(b). Thereafter, in a third round of selections, 16 million acres would be allocated among the 11 resident regional corporations entitled to Section 12(b) selections. Section 12(c), 43 U.S.C. (Supp. V) 1611(c).

The surface estate to an additional two million acres might be conveyed to regional corporations for cemetery and historical purposes, and to certain entities not otherwise covered; the unconveyed portion of this land would also be allocated among the twelve resident regional corporations. Section 14(h), 43 U.S.C. (Supp. V) 1613(h). Section 12 of the Act, 43 U.S.C. (Supp. V) 1611, restricted villages from selecting the surface estate to more than 69,120 acres from a national wildlife refuge or a national forest.

Section 11(b)(1) of ANCSA, 43 U.S.C. (Supp. V) 1610(b)(1), sets forth a list of more than 200 Native villages, each presumptively eligible for land benefits, subject to "findings of fact in each instance" by the Secretary that such listed villages meet the Act's requirements. In addition, the Act directed the Secretary to make "findings of fact in each instance" as to the eligibility of any non-listed villages claiming to meet those requirements. Listed and unlisted villages with less than

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[1]The regional corporation for Southeastern Alaska was excluded ecause Congress had previously appropriated $7.5 million in ayment of the judgment awarded the Tlingit-Haidas by the Court of 'aims. *Tlingit and Haida Indians of Alaska* v. *United States*, 389 F. 778 (Ct. Cl. 1968).

25 Native residents as of the 1970 census, or which are of a modern and urban character and have a non-Native majority, were ineligible. The Act, however, specified no procedure to be followed in the making of these eligibility determinations.

To implement the statute the Department of the Interior issued regulations. 43 C.F.R. Part 2650 (1973). They provided that the Alaska Area Office of the Bureau of Indian Affairs (BIA) was initially to determine the eligibility for land benefits of each Native village which applied. These initial determinations by the BIA became the Secretary's final decision unless protested "by any interested party" after publication; if reaffirmed after protest, they became final unless appealed to the Secretary. Any "person aggrieved" could appeal to an ad hoc board personally appointed by the Secretary (now called the Alaska Native Claims Appeal Board, 43 C.F.R. 4.700, 2651.2 (5) (1973)). The appeal was to be a de novo proceeding in which parties could request an evidentiary hearing on factual issues. The hearing was to be conducted by an administrative law judge. He would prepare a recommended decision, but it was not final, and was not disclosed to the parties. Instead, it was to be reviewed by the Board with the entire record, including the proposals for a recommended decision which the parties had filed and served on each other. The Board would then formulate its own recommended decision, which it submitted to the Secretary for his approval or disapproval. Only after the Secretary had finally approved the Board's decision did the parties see it.

2. In the instant cases, BIA's Alaska Area Director issued "final" decisions determining that eleven villages, three listed and eight non-listed, were eligible to select lands. Seven of the villages were located on Kodiak Island, or its neighbor, Afognak Island; two on Cook Inlet, where Anchorage is located; one in the Aleutians

(Pauloff Harbor),[2] and one (Solomon) on Norton Sound, east of Nome. The United States Fish and Wildlife Service of the Department of the Interior, the United States Forest Service of the Department of Agriculture, the State of Alaska, and certain environmental groups and individuals appealed one or another of the eleven decisions, contending, in effect, that the villages did not qualify. After full de novo proceedings the Board ruled, in a series of separate decisions approved by the Secretary, that the villages were ineligible, for lack of 25 residents or insufficient occupancy in 1970 (Pet. App. 77a, 92a-344a) The villages and their regional corporations then filed separate suits, which were consolidated, in the district court. The district court issued summary judgment in favor of the villages. *Koniag Inc.* v. *Kleppe*, 405 F. Supp. 1360 (Pet. App. 70a-91a).

The district court held that in four of the cases the protestants had no standing to appeal BIA's decision to the Secretary. Two involved appeals by the Fish and Wildlife Service to protect a wildlife refuge and the Forest Service to protect a national forest. The district court ruled that because the two villages involved had made commitments not to take land from either the refuge or the national forest, the Fish and Wildlife Service and the Forest Service had no interest to protect. (The district court did not discuss the government's argument, accepted by the court of appeals, that if these villages should select other lands, other villages in the region might be forced to choose refuge or forest land.) The two other "standing" cases involved appeals by the State of Alaska, which has a right to choose otherwise unselected lands under its Statehood Act. The district court held that the State had no interest because it had neither actually nor tentatively selected lands in this area prior to January

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[2]The controversy with respect to this Aleutian village was mooted by the Secretary's determination, after the district court's decision, that it was in fact eligible.

1969. Under ANCSA, lands tentatively approved for patenting to the State under its Statehood Act as of January 17, 1969, were withdrawn from selection by eligible villages. Patented lands were not available. The district court viewed the possibility of selections by the State after this date as too speculative to support an appeal against Native claims. The district court ruled that since these four appeals were not initiated by a party with standing, it would set aside the Secretary's decision, and reinstate the "final" decision of the BIA Area Director that the villages were eligible. In the seven other cases the district court rejected the villages' challenges to the appellants' standing.

As to those seven other cases, the district court held that Interior's appeals procedure denied due process, and that the integrity of the appeal process was tainted by legislative interference which destroyed the appearance of impartiality.

The district court viewed the appeal process as establishing a multi-tiered system under which the ALJs' recommended decisions were only the first step in an adversary procedure. To assure that the Secretary was not "foreclosing to himself knowledge of the Natives' contentions," the district court reasoned (Pet. App. 84a), due process required that the adversary process continue, by providing the parties an opportunity to challenge the ALJs' (and presumably the Board's) recommendations to the Secretary.

The district court ruled that the appearance of impartiality had been destroyed by two events: first, by legislative hearings held by a subcommittee of the House Committee on Merchant Marine and Fisheries chaired by Representative Dingell.[3] The hearings, in the nature of

[3] *Hearings on Alaska Native Claims Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. (1974).

"oversight" proceedings investigating administration of the Native Claims Act, took place while the villages' claims were being litigated before the Secretary. The court found that among the witnesses who appeared at the hearings was Ken Brown, "one of the Secretary's two principal advisors who reviewed the cases personally with him at the time he made his decision in the plaintiff's cases" (Pet. App. 85a). Second, two days before the Secretary made his decision, Representative Dingell had sent a letter to the Secretary requesting him to postpone his decision until the Comptroller General had reviewed the cases. At the least, the district court found, the congressional hearings were followed by the abandonment of proposed settlements which had been under discussion between the Fish and Wildlife Service and two villages on Kodiak.

As to these seven "due process" cases, the district court concluded that the record did not show the effect of the Dingell hearings had been dissipated. Since the statute contemplated that the Native claims would be settled by specified deadlines, instead of remanding to the Secretary the district court decided it was appropriate to reinstate the "untainted decision by the Secretary's delegate," the BIA's Area Director (Pet. App. 88a).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 37a-56a). In the four "standing" cases, it held that the district court had erred in denying administrative standing to the federal and state agencies. *Id.* at 43a-50a. (In a separate concurring opinion, Judge Bazelon agreed with the majority's refusal to equate judicial and administrative concepts of standing. *Id.* at 57a-69a.) In the remaining six cases (see note 2, *supra*), the court of appeals held that under ANCSA prospectively eligible villages have a sufficient property interest to be entitled to constitutional due process protection, and that Interior's "secret review process" had deprived them of that right (*id.* at 51a-54a). The impact of the oversight hearings, however, did not require reinstatement of the BIA Area Director's decisions: the oversight hearings had not so tainted the proceedings that the passage of 3½

years and the presence of a new Secretary made the usual remedy of remand impossible. Pet. App. 54a-56a. The court of appeals directed that on remand the Secretary permit the parties to take exceptions to the ALJs' decisions and to submit briefs to the Appeal Board. Finally, the court of appeals adopted the district court's reasoning that residency was open to redetermination for purposes of village eligibility. *Id.* at 56a.

ARGUMENT

The decision of the court of appeals is correct; it does not conflict with any decisions of this Court; and the issues presented are not of recurring importance. In our view, the court of appeals correctly construed the Alaska Native Claims Settlement Act and applied established principles of administrative law to insure that the Secretary completes the legislative scheme by distributing its benefits to eligible Native entities only.

1. Petitioners concede (Pet. 16) that "[it] may well be that the court of appeals was correct, as a general proposition, that administrative standing and judicial standing are not interchangeable." They argue, however, that the Secretary barred himself from listening to the State of Alaska, the Fish and Wildlife Service, and the Forest Service. That contention, we submit, was properly rejected below.

Because according eligibility status to phantom villages adversely affects bona fide Native groups, the policy of the Act favors a broad concept of standing. We must remember that in Section 11(b)(2), ANCSA specifically directed the Secretary to "make findings of fact in each instance" with respect to the eligibility of villages, even those listed in the statute. This highlights the congressional concern that only Natives should benefit and counsels against a restrictive approach to challenging eligibility. In the circumstances, we submit the court of appeals properly accorded deference to the Secretary's generous interpretation of his own regulation to accomplish the broad purposes of the Act.

2. With respect to the remedy fashioned by the court of appeals, petitioners contend (Pet. 13-15) that the normal procedure of remand was improper because it was less speedy than "reinstating" the BIA Area Director's decisions. Well-settled principles, however, support the court's action.

Again and again, this Court has stated that a reviewing court's function is limited to determining whether the administrative agency has erred. Then, if error is found, the court must remand. The court may not itself direct the agency's decision, for to do so would " 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' " See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 544-545 (1978), citing *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

That rule has special force here. In seeking to "reinstate" the BIA Area Director's decisions, petitioners would compel the finding of village eligibility to be made by a relatively subordinate departmental officer, rather than the Secretary in whom Congress has reposed the fact-finding task. Moreover, petitioners fail to point out that the record shows that the Area Director's decisions were reached without any adversary hearings at all, and then solely upon a field investigation which was administratively determined to be worthless.

3. Petitioners next argue (Pet. 18-20) that, once having determined Native residence in the course of enrollment, the Secretary could not reexamine Native residence for village eligibility purposes. On this issue the court of appeals adopted the district court's interpretation of the Act (Pet. App. 56a). Briefly, the district court reasoned that the roll prepared by the Secretary pursuant to Section 5 of the Act, 43 U.S.C. (Supp. V) 1604, was

different from residence for village eligibility under Section 11, 43 U.S.C. 1610. First, Section 11 does not refer to the roll at all; rather, it provides that residence for village eligibility be based on "the census or other evidence satisfactory to the Secretary." Second, the Section 11 requirement that the Secretary make "findings of fact in each instance" would be unnecessary if Congress had intended the roll to be conclusive. In our view, these considerations fully support the ruling.

4. Lastly, petitioners argue (Pet. 20-21) that, as to petitioner Salamatoff, the court of appeals, by remanding that case along with the other cases, "effectively denied to this petitioner its right to full, proper and meaningful judicial review." This issue was argued neither to the district court nor to the court of appeals.

At all events, the determination of Salamatoff's eligibility is essentially factual, and is, moreover, not yet finally resolved. The ALJ, who ruled initially in petitioner Salamatoff's favor, first concluded it was not a "tribe" or "band" because these concepts embraced the requirement of leadership (ALJ op. 4-5). Then, after reviewing the evidence, he ruled it was a "community or group of the type constituting a Native village within the meaning of the Act" (ALJ op. 17). The Board, however, basing its analysis on the factual evidence and the statute, reversed, concluding that "the persons enrolled to Salamatoff do not constitute a 'tribe, band, clan, group, village, community, or association' within the meaning of Section 3(c) of the Act" (Pet. App. 258a). Since the court of appeals held that due process required that, upon remand, all parties have an opportunity to file exceptions to the ALJs' decisions and to submit briefs to the Appeal Board, it would obviously be proper to allow the Fish and Wildlife Service, along with other parties in the case, to take exception to the ALJ's decision on Salamatoff. This factual matter presents no issue warranting the attention of the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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